(17)

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 214

GILCREASE OIL COMPANY, *Petitioner*,

v.

G. M. COSBY *et al.*, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

JAMES V. ALLRED,
Houston, Texas,
Counsel for Petitioner.

WYNNE & WYNNE,
ANGUS G. WYNNE,
Longview, Texas,
LESTER WHIPPLE,
San Antonio, Texas,
Of Counsel.

WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas, Texas — Central-4091

SUBJECT INDEX

Table of Cases Cited

Statutes, Rules and Texts Cited

In the

Supreme Court of the United States

OCTOBER TERM, 1943

No. 214

GILCREASE OIL COMPANY, *Petitioner,*

v.

G. M. COSBY *et al.*, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEF

To the Supreme Court of the United States and the Honorable Judges Thereof:

Petitioner replies to respondents' brief as follows:

JURISDICTION

Respondents assume that petitioner has counted time from date of denial of Second Petition for Rehearing. That is not correct. The First Motion was overruled March 4, 1943; three months thereafter would be June 4, 1943, but prior to the expiration of the three months' period, on May 15, 1943, petitioner's request for an extension of time was granted by this Honorable Court until July 5, 1943. Before the expiration of the extension, on June 28, 1943, an additional extension was granted by this Court until July 31, 1943, petitioner's petition, brief, and the record from the lower court being filed herein prior to said date.

STATEMENT

Respondents agree in their brief that this is a suit to fix boundary. The only question in the suit was to determine the north boundary of the Thad Snoddy 50-acre tract because that would be the south boundary of the Arthur Christian tract.

Respondents asked *affirmatively* in their pleadings for recovery of the strip (R. 19, 29), alleging in their pleadings that the line alleged by petitioner as the *south* line of the Arthur Christian tract (R. 2) was the *north* line of the Thad Snoddy tract (R. 12, 23); the pleadings of one of the respondents expressly alleging (R. 7) that "a portion of the tract of land was included within the fence of the Arthur Christian tract." The pleadings of both the petitioner and respondents unite in alleging that the following line is the south line of the Arthur Christian tract and the north line of the Thad Snoddy tract:

> "Thence following a fence on the North line of the Thad Snoddy 50-acre tract, as follows: South 88° 07′ East 274 feet; South 87° 43′ East 400 feet; East 500 feet; North 81° 58′ East 128.3 feet; East 473 feet, to a stake the Southeast corner of this tract."

All of respondents' instruments or deeds under Arthur Christian (petitioner's grantor), as well as Snoddy, on which their title is based, describe the same identical line as the *north* line of the Thad Snoddy tract of land. See defendant's Exhibits 19 (R. 361), 20 (R. 364), 40 (R. 367), 41 (R. 368), 21 (R. 370), 43 (R. 475), 44 (R. 476). Also, petitioner's Exhibits 51 (R. 435), 52 (R. 438), 53 (R. 440), 54 (R. 442), 55 (R. 445), 56 (R. 449), 90 (R. 461) and 92 (R. 464.)

It will be noted that the assignment referred to by respondents at the top of Page 3 of their brief was respondents' Exhibit 40 (R. 365) and is a quit-claim referred to in the opinion of the lower court as such (R. 524). It expressly describes the line petitioner contends for *as petitioner's south* line (R. 2) as the *north* line of the *Snoddy tract* (R. 367). All of the Arthur Christian deeds as well as the Snoddy quit-claims are in evidence at the instance of respondents *for all purposes* as their muniments of title and without limitation or restriction whatever, as was the case with the probate proceedings and the Kerber deed under which Loomis held in the *McBride* case. (Tex. Sup. Ct., 212 S. W. 480.)

REPLY TO RESPONDENTS' ANSWER TO PETITIONER'S SPECIFICATION OF ERROR NO. 1

(Top of Page 5, Respondents' Brief)

Petitioner does not seek to acquire any title "by virtue of erroneous recitations in respondents' deeds." Petitioner claims title by virtue of being the owner of the original Arthur Christian lease which covers the entire Arthur Christian tract and extends to the Arthur Christian *south* line wherever it may be, and irrespective of whether or not the Arthur Christian tract extends to a slight extent over into the Castleberry survey. Since respondents' pleadings, as well as all their instruments, fixed the *north* line of the Snoddy tract as being the same line claimed by petitioner as its *south* line, the true position of the line is a matter of law and not a question of fact to be decided by the court. Since it is a question of law and is the line which both the petitioner and respondents unite in alleging and which all

of respondents' instruments show it to be, it is fixed on the ground as a matter of law as the *north* line of the Snoddy tract; and since the line between the two tracts is *common*, and the two tracts adjoin and petitioner owns to the *south* line of the Arthur Christian tract under a lease covering the whole Christian tract executed five years prior in date to respondents' lease from the same Arthur Christian covering the same land, petitioner owns the minerals under the land by virtue of a prior lease and not by virtue of any so-called "erroneous recitations" in respondents' deeds.

Respondents had no "paramount title" from any "true owner." They claimed under both the Arthur Christian title and the Thad Snoddy title, and the trial court found both. (R. 504-507.) Also the Circuit Court of Appeals in its opinion holds the same. (R. 521-525.) Respondents supplemented their Christian title with their Snoddy quit-claims, as was done in the *McBride* case. Since their *Christian* title was five years later in date than the *Christian* title of petitioner and covered the same land covered by petitioner's title, respondents received no title under the *Christian* instruments; and since all of the land lay *north* of the Thad Snoddy *north* fence, they certainly received nothing under the *Snoddy* quit-claims. Therefore, respondents have no "paramount title" or, in fact, any title of any kind.

Respondents have admitted in their pleadings that the north line of the Snoddy tract is the identical line petitioner alleges it to be; and since all of respondents' instruments absolutely prove that to be true and since respondents did not allege mistake or ask for reformation of their instruments, the location of the land becomes a *matter of law* and not a question of *fact* to be decided by the court.

While it is true that petitioner thinks the finding of the lower court fixing the dividing line between the two tracts at a different place than alleged by respondents and in the face of and contrary to the allegations of respondents' pleadings and contrary to and in the face of all of respondents' instruments under which they claim, is manifestly contrary to the evidence, *petitioner is not asking this court to review the evidence.* What petitioner is asserting is that since respondents' pleadings allege the same line to be the *north* line of the *Snoddy* tract that petitioner alleges it to be, the pleadings of both parties unite in alleging it to be at the same place on the ground and the descriptions in all of respondents' instruments under Christian as well as under Snoddy show it to be at the same place alleged by all the pleadings, the location of the line is a question of *law*, not of fact.

ARGUMENT

I.

PETITIONER'S REPLY TO SECTION 1 OF RESPONDENTS' ARGUMENT

(Beginning on Page 7 of Their Brief)

Respondents say, the land in question is out of the Castleberry survey, but at the same time admit the original land marks of the survey no longer exist.

The case of *Ballard v. Stanolind Oil & Gas Company* (5th Cir.), 80 F. (2d) 588, holds that the original Arthur Christian lease dated April 28, 1930, petitioner's Exhibit 9 (R. 340-344), under which petitioner holds, covers the entire Arthur Christian tract, even if the Arthur Christian tract does extend to a slight extent over into the adjoining sur-

vey. In that case *this very lease* was under consideration and the court held that the entire tract was covered by the lease, expressly holding that the entire Arthur Christian tract is covered even though it does extend over into the adjoining survey. Thus, it would make no difference even if the tract did extend to a slight extent into the adjoining Castleberry survey.

Since it has been already held that this identical lease under which petitioner holds covers the entire Arthur Christian tract, it is immaterial where the original survey line ran; because the pleadings of both petitioner and respondents unite in fixing the dividing line between the Christian and the Snoddy tract at a definite place on the ground and the recitals in all of respondents' instruments fix it at the same place. This determines and fixes the *survey line* at the same place as the *property line*, as was held in the *Ballard* case.

The line alleged in all the pleadings to be the dividing line and described in all of respondents' instruments as being the north line of the Snoddy tract is not ambiguous in itself nor when fitted to the ground and there is no evidence and no finding to that effect. Respondent says it is ambiguous because it does not conform to the line found by the lower court. That does not make it ambiguous. It was the fence *found by the court* that had been moved (field notes reciting "as fenced 1931" R. 509, also see R. 178), *not the old hedge fence.* But it will be noted by reference to respondents' Arthur Christian instruments (R. 361, 364, 368 and 370), as well as all of their other descriptions, that the field notes for the fence "on the north line of the Thad Snoddy 50-acre tract" are tied in with the old gum

tree which is still on the ground. (R. 505, 508, 509.) Therefore, its location on the ground is definite and positive and can be at no other place than as described in the pleadings of both petitioner and respondents, as well as all of the instruments under which respondents claim. The moving of the fence would not make the field notes ambiguous. The leveling of the old hedge row would not make the field notes ambiguous, nor would the fact that it marks or does not mark the division of the Hathaway and Castleberry surveys make it ambiguous, nor would it be material if it is slightly over in the Castleberry survey.

Of course, in any case where the location of a boundary line is a question of fact, the task would be to find the footsteps of the original surveyor; but where the line is fixed by the instruments and the pleadings of all of the parties, it ceases to be a question of *fact* and becomes one of *law.*

Respondents claim the *Snoddy quit-claims* are a "superior outstanding title."

Petitioner has not said that defendant could not under the law set up a superior outstanding title, *but what petitioner has said is that respondents did not do so in this case.* Respondents have held and claimed under the *Christian* title from the beginning, claimed it before the Railroad Commission (R. 310), claiming it continually up to the trial, Exhibit 92 (R. 463), having signs on the wells labeling them as *Arthur Christian wells,* a sign on each well showing it as Arthur Christian Well No. 1, Castleberry Survey; Arthur Christian Well No. 2, Castleberry Survey; and Arthur Christian Well No. 3, Castleberry Survey, up to and during the time of the trial (photographs of these wells showing the signs being in evidence as Exhibits 71, 72

and 73, originals sent up), claiming under the *Christian* title at the trial, introducing all of the *Christian* instruments *for all purposes*, and without limitation (R. 312, 314, 315, 319, 320); and the *Christian* instruments are found by the trial court (R. 504-7), and again appear in the opinion of the Circuit Court of Appeals. (R. 523-4.) Thus, it is clear that the *Snoddy quit-claims* were merely *supplemental* and *supplemented* the *Christian* title under which respondents claimed, as held in *McBride v. Loomis.*

There is no outstanding title in the Snoddy quit-claims because all of them quit-claim land *north* of the Thad Snoddy *north* fence and *within the Christian tract* and, therefore, cannot, and do not, convey any title. Under the *Christian* deeds respondents receive no title because Arthur Christian had already conveyed his entire tract more than five years before the date of respondents' deed and petitioner holds under the prior deed.

Respondents cite *Williams v. Chandler*, 25 Tex. 4, which is a case in which one Cook in the early days of Texas in the year 1831 received a grant of land from the Stephen F. Austin Colony. The law as it was at that time forbade the alienation of the land for six years. In violation of the law, Cook made an attempted conveyance in the form known at the time as a "bond for title" to Williams of the south half of the land. Cook thereafter, and after he had held the league a sufficient length of time to make valid conveyances out of it, made certain conveyances to third persons of various tracts out of the north half of the league which he had kept, in which conveyances there were certain recitals that the south half of the league had been sold to Williams. After Cook's death, Williams sued the heirs of Cook for the south

half of the league on the void bond for title, claiming the benefit of the recitations in the deeds Cook had made to third persons not in any way parties to the suit or in any way involving the land in dispute. The court held that since the bond for title was absolutely void, being in violation of an express law, and since the recitations were only in deeds to third parties conveying different land other than the land involved in the suit, that Williams could not take advantage of them. To have allowed Williams to recover by virtue of the recitals would have allowed a sale of the south half of the land to stand that was expressly prohibited by law. But, if the bond for title had not been void, but only indefinite and subject to interpretation or completion by the recitals in the deeds and the deeds containing the recitals in question were being claimed under in that very suit and included the very land involved in the suit as they are in our case, the result would have been otherwise, and the law would have been declared as it was in the later case of *Havard v. Smith* (Court of Civil Appeals), 13 S. W. (2d) 743, which gives the benefit to a party who was not named as a party to the deed. Havard in that case had executed a deed to Falvey. That deed described a 73-acre tract. At the end of the description it recites that the land conveyed contained "73 acres of land, less 50 acres of said tract conveyed to C. C. Cherry." C. C. Cherry was not by name a party to that deed except under that recital. There was no deed of record from Havard to Cherry. Nevertheless, the heirs of Cherry sued the heirs of Havard and Falvey to recover that 50 acres. The Court of Civil Appeals held that the recital of "less 50 acres of said tract conveyed to C. C. Cherry" constituted an absolute muniment of title in favor of the heirs of C. C. Cherry and was sufficient to predicate an

instructed verdict in their favor in the trial court, which was affirmed in the Court of Civil Appeals.

The law declared in the case of *Havard v. Smith* has been often cited with approval by the Supreme Court of Texas. In *Simonds et al. v. Stanolind Oil & Gas Company* (Tex. Sup. Ct.), 114 S. W. (2d) 226, it is said that such "recitals might take the place of a deed or form in effect a muniment of title", citing *Havard v. Smith*, 13 S. W. (2d) 743. And in *Turner et al. v. Hunt et al.* (Tex. Sup. Ct.), 116 S. W. (2d) 688, it is said: "This formal recognition of Wilson's lease to Joiner was also binding upon plaintiffs in error J. W. Smith and R. H. Hedge, who claim under an oil and gas lease thereafter executed by Turner, citing *Havard v. Smith* (Tex. Civ. App.), 13 S. W. (2d) 743." In *Murphy v. Jamison* (Tex. Civ. App.), 117 S. W. (2d) 127, it is said: "We do not review the facts of that case but cite it only to illustrate the conclusive effect given by our Supreme Court to a construction by the parties of a reservation in their chain of title." Citing *Havard v. Smith*, 13 S. W. (2d) 743. To the same effect is *Henderson v. Book et al.* (Tex. Civ. App.), 128 S. W. (2d) 117, writ of error refused by the Supreme Court, in which it is said: "it has been many times held that recitals in deed bind both parties and parties claiming under such deed." Citing *Havard v. Smith*, 13 S. W. (2d) 743. And in the recent case decided by the Supreme Court of Texas, *Greene et al. v. White et al.*, 153 S. W. (2d) 575, it is said: "It is held that the recital of one deed in another binds the parties to the deed containing the recital, and those who claim under them, and may take the place of a deed and thus form a muniment of title." Citing *Havard v. Smith*, 13 S. W. (2d) 743.

We could cite many more cases.

It will be seen that all of the recitals under consideration by the court in the foregoing cases were subsequent to the execution of the instruments which they interpreted, and the plaintiff was not shown to have relied on them. Respondents say that the recitals contained in their deeds are subsequent to the date of petitioner's deed and that petitioner is not shown to have relied thereon. As is well known, that principle refers to equitable estoppel or estoppel in pais, and not to estoppel by deed. It has uniformly been held in Texas that recitals in deeds subsequent are binding on the parties as an interpretation of prior deeds. That is the law laid down by all of the foregoing decisions beginning with *Havard v. Smith*, and we even find it in an early case by the Texas Supreme Court in 1849, *Hardy and Others v. De Leon*, 5 Tex. 211, in which the court says: "If a defendant has acknowledged the title of plaintiff, he cannot afterwards dispute it. Where there are several parties to the record on the same side, the admissions of one will be taken as the admissions of all where there is a joint interest or privity of design between them. A recital of one deed in another binds the parties and those who claim under them *by matters subsequent.*" (Italics ours.)

Thus, it is obvious that the recitals contained in the *Christian* deeds to respondents (R. 360, 363, 367 and 370), all of which describe the *south* line (R. 2) of the *Christian* as the *north* line of the *Snoddy*, are binding on respondents. They plainly show the interpretation and understanding given by petitioner's grantor and all of the respondents, which recitals respondents have accepted and relied on as to where the *south* line of the *Christian* tract is. Respondents

introduced these deeds in evidence *for all purposes.* They claim under them. They are bound by them. Both titles were introduced and both are before the court. Both are found by the lower court and both were found by the Circuit Court of Appeals. One simply supplements the other and respondents claim under both, *exactly as in the McBride case.*

Respondents say that the facts in the present case are distinguishable from the facts in the case of *McBride v. Loomis* (Tex. Sup. Ct.), 212 S. W. 480, because the court held in that case that "the quit-claim deed from the Howard heirs did not constitute the acquisition of a new and independent title, but merely supplemented the title theretofore held and claimed by him under Howard, the common source."

In the *McBride v. Loomis* case, one Charles H. Howard owned the title to a tract of land in El Paso County, Texas, in 1874, and in 1877 died intestate. During the years 1875, 1876 and 1877, Charles H. Howard agreed in writing to make a deed to the land to one John McBride, who fully paid for the land by the delivery of certain wagons, horses, etc., but Charles Howard died without having made the deed. One Charles Kerber was appointed administrator of the estate of Charles H. Howard, and was also appointed temporary administrator of the estate of John McBride. Charles Kerber in 1881, as administrator of the estate of Charles H. Howard and as temporary administrator of the estate of John McBride, made a deed to the land to John C. Ford. The probate proceedings authorizing the deed, as well as the deed itself, contained a recital as follows:

> "And it appearing further that said Charles H. Howard during his lifetime at various times in the

years 1875, 1876 and 1877, agreed in writing to make deeds to John E. McBride for certain parcels of land in the Cuadrilla in El Paso County, Tex., and that said John E. McBride fully paid for said lands according to the terms of said agreement, and that said Charles H. Howard departed this life December 18, 1877, without making deeds to said land to the said McBride in accordance with such agreement."

Ford's title came into the hands of A. M. Loomis, the defendant in this case. The heirs of McBride brought suit in trespass to try title against Loomis for the land. The case was tried in the District Court of El Paso. It was shown that John McBride did not die until August 21, 1909. Therefore, when Kerber assumed to act as temporary administrator of his estate in 1881 under orders of the probate court, he was administering the estate of a living man. Therefore, the proceedings and the deed were void as far as passing any title out of John McBride was concerned. The heirs of McBride had no character of written instrument other than the bare recital in the defendant's deed to John C. Ford and the probate proceedings authorizing such deed produced by the defendant in support of title. Only the paper title, of course, remained in Charles H. Howard who had passed to Ford under the Kerber deed whatever title he had. The heirs of McBride claimed the benefit of the recital above mentioned in the defendant Kerber's deed to Ford. Under the Ford deed, of course, John McBride was common source, as Arthur Christian is in our case, but Loomis also, just as was done in this case, obtained a quit-claim from the heirs of Charles Howard. Loomis introduced his deed to Ford and, also, his quit-claim from the Howard heirs. The District Court, as the

trial court did in our case, held since the McBride heirs had no written instrument but relied only on the recital in Loomis' deed from Kerber, the administrator, to Ford above mentioned, that said recital could not be relied on to prove their title, because Loomis also had the Howard paper or legal title by quit-claim from the Howard heirs. If the McBride heirs could not use the recitals in the defendant Kerber's deed to Ford and the proceedings in the probate court authorizing said deed, there was, of course, no way to show that the title had gone out of Charles H. Howard and the quit-claim deed from the Howard heirs would convey good title, while if plaintiff could use the recitals in the defendant's deeds, of course the equitable title had passed out of Howard and into John McBride, so the quit-claim would not convey anything, because the Howard heirs had nothing left to convey.

The decision of the District Court was affirmed by the El Paso Court of Civil Appeals in *McBride et al. v. Loomis*, 170 S. W. 825, as the Circuit Court of Appeals has done in our case. The plaintiffs then appealed to the Supreme Court, the decision being the same quoted by petitioner in its petition and brief, *McBride et al. v. Loomis* (Tex. Sup. Ct.), 212 S. W. 480, in which the court in reversing the decision of the District Court and the Court of Civil Appeals said:

> "The deed from the administrator of the Howard estate to Ford was introduced without qualification or limitation by defendant. Were the recitals of this deed evidence as against the defendant of the facts recited?
>
> "Defendant concedes that, if the recitals were in a deed constituting a link in a chain of title under which he claimed, such recitals would be admissible against

him. He seeks to avoid their effect by repudiating any claim thereunder and by denial that he was either a party or privy thereto, basing his title upon the quit-claim from the Howard heirs, a separate and distinct title.

"Defendant claimed title under the administrator's deed. He testified that he went into possession of and occupied the land in January, 1906, shortly after the execution of the deed to him under the Ford chain of title, and prior to the execution of the deed from the Howard heirs. His claim of title and possession were referable exclusively to his deed under the Ford title of which the deed in question formed a link. Defendant's predecessors in title were in possession and assert the Howard title through McBride many years prior to the execution of the quit-claim from the Howard heirs. Nor is there evidence of a repudiation of claim under this deed to the date of and during the trial of this cause. In so far as the record discloses, the deed constituted one of the links in a chain of title upon which he relied. There was no admission in the trial court by defendant that the administrator's deed was invalid; such admission being made only on appeal. The deed being thus relied on by defendant, and it, together with its recitals, having been introduced by him, the recitals were available to plaintiffs in the establishment of their title."

* * * * *

"In our view of the case, the introduction by defendant *without qualification or limitation* of the deed from the administrator of the Howard estate to Ford, together with the probate order upon which same was based, esablished that McBride acquired from Howard the equitable title to the land, and there passed to the heirs of Howard the bare legal title, which is subordinate to the title which thus vested in McBride.

> The deeds to Ford from the administrators of the estates of McBride and Howard being void and conveying no title, it follows that, if McBride was the common source, plaintiffs claiming through McBride, holding the equitable title, and defendant under the quit-claim deed from the Howard heirs, holding only the bare legal title, plaintiffs have established the superior title to the land." (Italics ours.)

Again referring to the statement made by respondents in their brief at the bottom of Page 10 and the top of Page 11 that the instant case is distinguishable from the case of *McBride v. Loomis* because the court in the *McBride* case held that the quit-claim deed from the Howard heirs to defendant "did not constitute the acquisition of a new and independent title." The reason that the court held the quit-claim was not a new and independent title was because the recitals in the administrator's deed from Kerber, administrator of Howard, to Ford showed by a recital therein that John McBride had paid the purchase price of the land, although no deed had ever issued to him. Since the plaintiffs, the McBride heirs, were given the benefit of the recital in the defendant's deed, the equitable title had gone out of Charles Howard. Therefore, the heirs of Charles Howard had nothing to convey when they executed and delivered their quit-claim to the defendant Loomis. Therefore, when Loomis, the defendant, obtained the quit-claim it "did not constitute the acquisition of a new and independent title."

The circumstances are the same in the instant case. If petitioner is given the benefit of the recitals in respondents' deeds, it is proved as a matter of law that the dividing line between the Christian and Snoddy tract is the line alleged in petitioner's complaint and alleged in respondents'

pleadings, and definitely and positively recited in all of respondents' deeds, quit-claims, and other instruments under Christian, as well as under Snoddy. The result is that the Snoddy title does not constitute "a new and independent title" because the instruments evidencing such title attempt to convey land already conveyed to petitioner by Arthur Christian prior to the conveyances to respondents and entirely outside of the Snoddy tract and north of Snoddy's north fence and outside and within the Christian tract already owned by petitioner by virtue of the original lease executed by Christian April 28, 1930, petitioner's Exhibit 9. (R. 340.) Respondents did not receive any land under a conveyance five years after Christian had already conveyed the land, when on December 22, 1935 and after oil wells had been drilled in every direction, Arthur Christian signed an attempted lease to Beavers, defendant's Exhibit 19. (R. 360.) Said attempted lease did not and could not convey anything because the same land had already been conveyed under the prior lease, and since it was already conveyed and was north of Snoddy's *north* fence, the quit-claims and other instruments from Snoddy did not constitute "a new and independent title" because they did not convey anything. They show by their very terms that they attempt to convey land entirely outside the Snoddy tract and land Snoddy never did own, and north of his north fence.

All the authorities, particularly *McBride v. Loomis* and *Havard v. Smith* (which is the leading Texas case on estoppel by deed), make it clearly evident that the fact that the recitals in respondents' deeds were made after petitioner acquired its title, or that petitioner did not rely upon them,

or that they were not made for its benefit, has nothing whatever to do with *estoppel by deed.* Respondents' arguments as to these recitals being subsequent and that petitioner did not rely upon them, and that they were not made for petitioner's benefit, apply only to *equitable estoppel* or estoppel in pais and not to *recitals in deeds.*

Since respondents introduced both the Christian and Snoddy instruments in evidence *for all purposes,* relied upon them and obtained their purported title under Christian, this case is on all fours with *McBride v. Loomis,* supra; and the exact legal question is before the court in this case that was before the Supreme Court of Texas in the *McBride* case; and the decision of the Circuit Court of Appeals below is squarely in conflict with the local law of Texas as enunciated in *McBride v. Loomis.*

II.

REPLY TO ESTOPPEL AGAINST PETITIONER ON ACCOUNT OF DRILLING THREE WELLS AS OFFSETS

Section 2 of respondents' argument beginning at the top of Page 12 of its brief is devoted to its contention that the holding of the lower court that petitioner had lost its land by estoppel because it did not set up its title before the Railroad Commission and was silent while the respondents drilled three wells, having in the meantime drilled three of its eleven wells as offsets to the three wells drilled by respondents, was not in conflict with local Texas law.

In support of their contention respondents cite several cases, none of which are in point. In the case of *Guest v.*

Guest, 12 S. W. 831, the plaintiff not only bid in the land at executor's sale for the defendant's father and expressly advised the defendant to go on the land and take possession of it and make valuable improvements on it, but the defendant held it for 10 years, which is the time required in Texas for the maturity of the Statute of Limitation giving the one in possession absolute title.

In *South Penn. Oil Co. v. Calif. Creek Oil & Gas Co.*, 140 F. 507, the plaintiff not only actively participated in the improvement but accepted royalty from the very lease he later tried to set aside.

In *Luling Oil & Gas Co. v. Magnolia Petroleum Co.*, 135 S. W. (2d) 738, it is judicial estoppel and not estoppel in pais that is the subject of the opinion.

In *Loper v. Meshaw Lumber Co.*, 104 S. W. (2d) 597, the plaintiff was not only present *while the title was being conveyed* to the defendant, but actively participated therein, and the defendant was expressly acting for his benefit in so doing as will be seen by examining the opinion.

Certainly silence does not constitute estoppel, and has been often so held in Texas.

Williams v. Conger (Tex. Sup. Ct.), 49 Tex. 602;
Horst v. Herring (Tex. Sup. Ct.), 8 S. W. 306;
Decker v. Rucker (C. C. A.), 202 S. W. 1001, error refused.

Certainly the drilling of offsets on its land could not constitute estoppel when necessary to comply with legal obligations.

Respondents claim less than one acre of ground, while petitioner had approximately 30 acres on which it drilled only 11 wells while respondents drilled 3 wells on the acre. Petitioner not only had a legal right to drill its wells but was under an obligation to its lessor to do so. 31 *Tex. Jur.*, 822, Sec. 179.

The only remaining element of alleged estoppel is petitioner's failure to urge title before the Texas State Railroad Commission. That question has been set at rest by the case of *Magnolia Petroleum Co. v. Railroad Commission et al.* (Tex. Sup. Ct.), 170 S. W. (2d) 189. Since it has been held by the Texas Supreme Court that the question of whether or not the issue of title was raised before the Railroad Commission was not even admissible evidence in a subsequent suit for title of the land, to hold that such failure constitutes estoppel or even is an element of estoppel is plainly in conflict with local state law as declared by the Supreme Court of Texas in the *Magnolia* case and the opinion of the Circuit Court of Appeals is squarely in conflict therewith.

III.

DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS CALLING FOR EXERCISE OF SUPERVISORY POWER BY THIS COURT

Respondents contend that the judgment is a mere clerical error and that petitioner did not separately claim the land and besides it is not worth anything.

By referring to the map in the appendix at the back of petitioner's petition and brief, it will be seen that there

is more than half of the entire tract north of the line found by the court. Since the tract contains two acres, there is more than an acre north of the line found in the fact findings (No. 12, R. 509).

This Court knows that the East Texas oil field is one of the most productive, if not the most productive, in the world. The land in dispute is more than an acre in the heart, generally known as the fairway, of the East Texas oil field. The trial court said at the trial: "We are figuring this East Texas real estate like they do in New York City." (R. 79.) This Court knows judicially that each acre, irrespective of whether or not it has been drilled, has tremendous value. To show the tremendous value, the respondents have drilled and are now operating three wells on less than one acre. To say that a tract of land such as this in the heart of the East Texas oil field is valueless and the wrongful taking of more than an acre of our land is harmless error is quite remarkable to say the least.

It is, of course, unnecessary that the value be separately shown. The suit was not brought separately for the tract. It is a Texas trespass to try title suit to determine boundary. The only question in the suit is the location of the boundary. Petitioner is entitled as a matter of right to any land north of the boundary determined by the court. By the very nature of the suit, petitioner does separately contend for any land not determined to be within respondents' boundary.

Respondents quote Rule 60, Subdivision (a), Federal Rules of Civil Procedure, providing for correction of clerical mistake in orders, judgment, etc., saying that petitioner made no such motion. However, respondents do not say

that petitioner should have filed such motion as a prerequisite to its right to raise this question on appeal. It is evident that Rule 60 is for the purpose of saving the expense of an appeal to correct those cases in which there is a mere clerical error or mistake in a judgment or other order without the expense of an appeal, but it certainly does not place on the losing party the burden of determining which errors might be said to be clerical with the requirement that as to those errors a motion must be first filed as a prerequisite to appeal as to them.

That conclusion is contrary to the very spirit of the rules. Rule 48 providing that exceptions are unnecessary "and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." It was held in *Stoltz v. U. S.* (9th Cir.), 99 Fed. (2d) 283, that an appeal from a judgment in unlawful detainer action would be decided on the merits notwithstanding that no question was raised as to admissibility of evidence and that there was no request for special findings and that there were no exceptions. Many similar decisions could be cited. Rule 52, Subdivision (a) expressly provides: "Requests for findings are not necessary for purposes of review", and it has been held that suggested findings filed by the unsuccessful party would not avail him anything and are not even properly a part of the record on appeal, but that he should take his objection by way of appropriate assignments of error on appeal. No request for judgment is necessary and no motion for a new trial is necessary, and that is certainly so where it is felt to be purely a waste of time of the attorneys as well as the

court, and the attorneys feel certain that it will be overruled.

Petitioner has never made any contention except that the old hedge fence was the line. As pointed out in petitioner's brief, during the twenty-one months that this case was held under advisement by the trial court, at least three written briefs were presented and the case was orally argued, and the petitioner's attorneys thought that no further argument would do any good.

The respondents now admit that the line fixed by the judgment was error. They agree that the purpose of the suit was to determine the boundary. The judgment fixes the boundary at the Beaver's line. By referring to the map in the appendix at the back of petitioner's brief, it will be seen that the pleadings of both petitioner and respondents and all of respondents' instruments describe the old hedge fence as the *north* boundary line of the *Snoddy* tract. Yet the trial court found that a line beginning 10 feet south of the northeast corner of the tract running diagonally east across the tract to the southeast corner was the line. *Then the trial court rendered judgment that still another line, the Beaver's line,* is the north line of the Thad Snoddy 50-acre tract, although nobody in this suit had claimed it to be the line, and respondents now admit that it is error. Respondents agree that the purpose of the suit was to determine the line and now admit that the wrong line has been determined. Certainly a line has been determined that nobody in this suit claims is the line, and, since it is an admitted error, it should be corrected.

CONCLUSION

WHEREFORE, petitioner prays that said writ of certiorari be granted.

Respectfully submitted,

JAMES V. ALLRED,
Houston, Texas,
Counsel for Petitioner.

WYNNE & WYNNE,
ANGUS G. WYNNE,
Longview, Texas,
LESTER WHIPPLE,
San Antonio, Texas,
Of Counsel.